SUPREME COURT, U.S.

No. 09-588 OCT 5 - 2009

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

ROBERTA A. GOLDEN, PETITIONER

v.

CHARLES J. HOUSMAN, TRUSTEE OF THE PINE BANKS NOMINEE TRUST, AND WALLACE CAPITAL, LLC

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

PETITION FOR WRIT OF CERTIORARI

ROBERTA A. GOLDEN
Pro Se

41 Pleasant Street
Framingham, MA 01701
(508)370-9881

CURRY & TAYLOR • (202) 393-4141

QUESTION PRESENTED

Was petitioner denied due process when she was prevented from adducing any proof in support of her objections to foreclosure, denied the right to take testimony from or confront the respondents in rebuttal to their foreclosure request, and denied the opportunity to show and then argue on this evidence that the Allonge and Loan Reinstatement Agreement was modified by the parties so that foreclosure was not warranted?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 3

RELEVANT PROVISIONS INVOLVED 4

STATEMENT 4

REASONS FOR GRANTING THE PETITION 15

CONCLUSION 23

APPENDIX

Maine Supreme Judicial Court Decision 1a
Maine SJC Reconsideration Denial 3a
Superior Court Decision (Wallace Capital LLC) 4a
Allonge and Loan Reinstatement Agreement 8a
Affidavits 13a
Superior Court Decision (Pine Banks) 27a

TABLE OF AUTHORITIES

Page

CASES

ADDINGTON V. TEXAS, 441 U.S. 418, 423(1979) 21
AOUDE V. MOBIL OIL CORP., 862 F.2D 890,894(1ST CIR. 1988) 21
CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 470 U.S. 532 (1985) 18
D.H. OVERMEYER CO. V. FRICK CO., 405 U.S. 174, 185(1972) 23
FORREST ASSOC. PASSAMAQUODDY TRIBE, 760 A.2D 1041, 1043(ME 2000) 22
FUENTES V. SHEVIN, 407 U.S. 67, 95(1972) 23
GOLDBERG V. KELLY, 397 U.S. 254, 262-263(1970) 18, 20, 21
HAMDI V. RUMSFELD, 542 U.S. 507, 528-529(2004) 19, 21
ICC V. LOUISVILLE & N. R. CO., 227 U.S. 88,93-94(1913) 20, 21
JOINT ANTI-FASCIST REFUGEE COMMITTEE V. MCGRATH, 341 U.S. 123 (1951) 18
LOS ANGELES V. DAVID, 538 U.S. 715, 717(2003) 18
MACHIAS SAV. BANK V. RAMSDELL, 689 A.2D 595, 599(ME 1997) 22
MATHEWS V. ELDRIDGE, 424 U.S. 319, 334-335(1976) 18, 19
MCCARTHY V. U.S.I. CORP., 678 A.2D 48, 51-52(ME 1996) 22
MEMPHIS LIGHT, GAS & WATER DIV. V. CRAFT, 436 U.S. 1,13-14(1978) 19
MORRISSEY V. BREWER, 408 U.S. 471, 481(1972) 18, 20
MULLANE V. CENTRAL HANOVER TR. CO., 339 U.S. 306, 314(1950) 19
MUTHER V. BROAD COVE SHORE ASSOCIATION, 968 A.2D 539, 541(ME 2009) 22
ROADWAY EXPRESS, INC. V. PIPER, 447 U.S. 752, 766-767(1980) 18
VERIZON NEW ENGLAND, INC. V. PUB. UTILS. COMM'N, 866 A.2D 844, 849(ME 2005) 14
WHITE V. FLEET BANK OF MAINE, 875 A.2D 680,

683(ME.2005) 22
WILLNER V. COMMITTEE ON CHARACTER AND FITNESS, 373 U.S. 96, 103-104(1963) 20

STATUTES

15 U.S.C. § 1601 5
28 U.S.C. § 1257(A) 3, 4
MAINE REV. ST. § 6321 ..... 6, 11, 13

OPINIONS BELOW

The published, unreported Memorandum of Decision of the Maine Supreme Judicial Supreme Court in *Charles H. Housman, Trustee et al. v. Roberta A. Golden* (Docket No. Yor-08-559), filed and decided on May 12, 2009, affirming the entry of two judgments in respondents' favor, respectively, allowing foreclosure and sale of petitioner's property pursuant to the parties' Allonge and Loan Reinstatement Agreement, is set forth in the Appendix hereto(App. 1-3).

The two unpublished judgments in respondents' favor, dated September 12, 2008, and September 18, 2008, respectively, allowing foreclosure and sale of petitioner's property pursuant to the parties' Allonge and Loan Reinstatement Agreement in *Charles J. Housman, Trustee, and Wallace Capital, LLC v. Roberta A. Golden*, York County Superior Court Docket No. RE-2006-00044, is set forth in the Appendix hereto(App. 4-6;27).

The parties' Allonge and Loan Reinstatement Agreement, dated July 31, 2007, is set forth in the Appendix hereto(App. 8-12).

The affidavit of Alan E. Shepard, Esq., counsel for respondents, in support of default of the Allonge and Loan Reinstatement Agreement, dated June 30, 2008, filed in *Charles J. Housman, Trustee, and Wallace Capital, LLC v. Roberta A. Golden*, York County Superior Court Docket No. RE-2006-00044, is set forth in the Appendix hereto(App. 13-15).

The affidavit of petitioner Roberta A. Golden opposing default of the Allonge and Loan Reinstatement Agreement, dated July 10, 2008 (without exhibits), filed in *Charles J. Housman, Trustee, and Wallace Capital, LLC v. Roberta A. Golden*, York County Superior Court Docket No. RE-2006-00044, is set forth in the Appendix hereto(App. 16-19).

The affidavit of petitioner Jeffrey J. White opposing default of the Allonge and Loan Reinstatement Agreement, dated July 14, 2008 (without exhibits), filed in *Charles J. Housman, Trustee, and Wallace Capital, LLC v. Roberta A. Golden*, York County Superior Court Docket No. RE-2006-00044, is set forth in the Appendix hereto(App. 20-21).

The second affidavit of Alan E. Shepard, Esq., counsel for respondents, in support of default of the Allonge and Loan Reinstatement Agreement, dated August 4, 2008, filed in *Charles J. Housman, Trustee, and Wallace Capital, LLC v. Roberta A. Golden*, York County Superior Court Docket No. RE-2006-00044, is set forth in the Appendix hereto(App. 22-23).

The affidavit of Steven A. Ross, Esq., counsel for respondents, in support of default of the Allonge and Loan Reinstatement Agreement, dated August 12, 2008, filed in *Charles J. Housman, Trustee, and Wallace Capital, LLC v. Roberta A. Golden*, York County Superior Court Docket No. RE-2006-00044, is set forth in the Appendix hereto(App. 24-26).

The one-page unreported Order of the Maine Supreme Judicial Supreme Court in *Charles H. Housman, Trustee et al. v. Roberta A. Golden* (Docket No. Yor-08-559), dated June 12, 2009, denying petitioner's Motion to Reconsider the Court's Decision dated May 12, 2009, is set forth in the Appendix hereto(App. 7).

JURISDICTION

The decision of the Supreme Judicial Court of Maine, the highest State court in Maine in which a decision could be had, affirming the entry of two judgments in respondents' favor allowing the foreclosure and sale of petitioner's property despite petitioner's due process arguments, was decided and filed on May 12, 2009(App. 1-3). The Order of the Maine Supreme Judicial Court denying petitioner's Motion for Reconsideration on June 12, 2009, finally disposed of petitioner's claims based upon the due process clause of the federal constitution, all consistent with the language of 28 U.S.C. § 1257(a)(App. 7).

On September 9, 2009, petitioner applied to Mr. Justice Breyer of this Court for an extension of time until November 9, 2009, to file her petition for certiorari from the decision of the Maine Supreme Judicial Court on June 12, 2009, denying petitioner's Motion for Reconsideration (*Golden v. Housman, Trustee et al.*, U.S. Supreme Court Docket No. 09A293). On September 25, 2009, Mr. Justice Breyer extended the time for petitioner to file her petition in this Court until November 9, 2009(*Id.*). This petition is filed within the time for filing as extended by Mr. Justice Breyer.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT

Since 1987, petitioner Roberta A. Golden ("petitioner") owned the property located at 140 Stearns Road in Qgunquit, Maine("the property" or "the locus"). The locus has a spectacular, unobstructed

view of the Atlantic Ocean and the Marginal Way in Ogunquit. Petitioner planned to have the property become the site of her retirement home and to that end she demolished the small cottage originally situated there and began the construction of her new home.

In order to fund this new construction, petitioner on November 24, 2004, borrowed $1,050,000 from respondent Charles J. Housman, Trustee of the Pine Banks Nominee Trust ("respondent" or "Pine Banks") and personally executed a promissory note for a construction loan in this amount while granting Pine Banks a mortgage on the property in order to secure the loan. On the same day, petitioner executed a Construction Holdback Agreement which expressly provided that it was a contract for a short-term loan, that it was commercial in nature and was therefore exempt from the federal Truth in Lending Act and Regulation Z. See 15 U.S.C. §§ 1601 *et seq.* An origination fee of two points ($21,000) was withheld at the closing on November 24, 2004.

The terms of the note provided for interest at the rate of 14% and petitioner received an initial advance of $550,000. The note was set up so that interest payments in the amount of $73,500 were paid in advance at the closing on November 24, 2004. Interest only was then payable beginning on June 29, 2005, with the entire balance of the loan due on or before November 29, 2005.

During the summer of 2005, petitioner encountered difficulties with the ongoing construction of her home. The original contractor breached his obligations under the construction contract and

abutting homeowners challenged the issuance of the building permit by the Town of Ogunquit, impeding the development. Pine Banks refused to disburse any further monies to petitioner after July of 2005, forcing petitioner to spend $41,000 of her own funds in order to continue the project. Construction ceased in September of 2005 even though only $820,000 had been drawn down from the original loan amount from Pine Banks of $1,050,000.

By November 29, 2005, petitioner had defaulted under the Pine Banks note and in order to rejuvenate the project, on January 17, 2006, she executed a second note and mortgage on the property in favor of respondent Wallace Capital, LLC ("respondent" or "Wallace"), a business associate of Pine Banks, in the principal amount of $600,000, a loan which required petitioner to pay 10 points and monthly interest beginning in March of 2006. The entire principal balance was due on September 17, 2006.

Wallace released little, if any, funds to petitioner under this loan. Instead, on March 23, 2006, both Pine Banks and Wallace filed a complaint for foreclosure in the York County Superior Court pursuant to Maine Rev. St. §§ 6321 *et seq.*, alleging that Golden was in default under both notes. The alleged amount due on account of petitioner's default under the Pine Banks note was $816,227 in principal, $19,045.30 in interest, $4,151.13 in late fees and $6,801.90 in default fees plus an unspecified sum in legal fees and costs. The alleged amount due from petitioner under the Wallace note was $178,875 in principal, $5,366.25 in interest, $115.52 in late fees and $1,490.63 in default fees plus legal fees and costs.

Petitioner answered the respondents' complaint for foreclosure by denying all of their claims and asserting twenty affirmative defenses as well as six counterclaims including breach of contract, breach of the implied covenant of good faith and fair dealing, a failure to comply with the loan documents and a change in the course of dealings, fraud, deceit and misrepresentation as well as various violations of state and federal consumer protection laws.

On February 7, 2007, the York County Superior Court, Brennan, J., denied respondents' motion for summary judgment on their claims for foreclosure. The motion judge found there were genuine issues of material fact for trial about whether respondents' refusal to disburse funds to complete the construction was justified in the circumstances; whether petitioner was right in refusing to make payments under the notes until these disbursements had taken place; and whether the amount allegedly due under each of these notes was correct.

In addition, petitioner asserted certain insurance issues and a five-month construction delay due to litigation with her neighbors as factors affecting her payment under the notes inasmuch as the notes called for installment disbursements based upon the progress of construction. Specifically, petitioner "has alleged facts that, if true, tend to show some oral agreement about construction draws outside of the otherwise clear terms of the note and mortgage...."

In the wake of this ruling, petitioner and respondents entered into an Allonge and Loan Reinstatement Agreement on July 31, 2007 ("the

Allonge")(App. 8-12). Drafted by respondents' attorney, it provided that Golden would pay respondents $50,000 immediately upon its execution for reinstatement of both loans with the funds to be applied to accrued interest under the Pine Banks note(App. 8-9). In addition, the parties agreed to modify petitioner's obligations under the notes to Pine Banks and Wallace as follows:

> 1. The maturity date for both notes was extended to August 1, 2008, with no required monthly payments;
>
> 2. The interest rate on the Wallace note was reduced to 12% retroactive to the closing on January 17, 2006;
>
> 3. Wallace was to disburse the remaining balance of the construction loan to petitioner of $405,152.30 per an agreed upon disbursement schedule and to advance monies for the payment of all delinquent real estate taxes;
>
> 4. Petitioner agreed to pay any increase of costs beyond the disbursement schedule from her own funds within 30 days;
>
> 5. Respondents waived any default fees, interest and late fees accrued to date;
>
> 6. The construction of petitioner's home was to be substantially complete by February 1, 2008; and
>
> 7. Petitioner was to be responsible for attorney's fees and costs in the aggregate amount of $18,000,

> to be collected on the notes' maturity without interest and without prejudice to the collection of additional fees for any future defaults.

(App. 9-10).

The Allonge also contained petitioner's acknowledgment that as of July 30, 2007, she owed $987,634.77 in principal and interest to Pines Bank and $271,762.69 in principal and interest to Wallace(App. 10). Finally, petitioner agreed

> to a stipulation of Judgment and dismissal of [her] counterclaims in Superior Court, which shall be held in escrow, and not to be filed until August 1, 2008, or sooner if the loan is paid in full, which judgment shall acknowledge that [petitioner] had defaulted on the obligations, but there shall be no judgment of foreclosure entered. The Judgment shall also provide that a Judgment of Foreclosure shall be entered by the Court in the future, if there are any further defaults by [petitioner] in the loan obligations, and in the performance of this Agreement. The Court would accept an affidavit as evidence of any default, and [respondents] would provide a copy to [petitioner's] attorney upon filing. [Petitioner] would have 14 days from the date of the filing to object. After filing of an objection by [petitioner], or upon failure to file an objection, the Court would have the discretion to either enter the Judgment of Foreclosure, or conduct a hearing on the alleged default on the next available trial date. A default as defined herein shall be the failure of [petitioner] to perform any

of the following terms:

> a. Have the construction substantially completed on or before February 1, 2008;
> b. Pay off the underlying obligation on or before August 1, 2008;
> c. Pay the difference for any increased costs beyond the disbursement schedule out of her own funds within a period of 30 days after the individual disbursements; [and]
> d. Maintain adequate homeowners insurance on the property.

(App. 10-11).

Nowhere in the Allonge----drafted by respondents' attorney---did petitioner clearly and unequivocally waive any of her constitutional rights; *and there is no provision anywhere in the Allonge prohibiting or preventing the parties from modifying its terms either orally or in writing*(App. 8-12).

Immediately after the Allonge's execution, petitioner promptly made arrangements with a new builder (Jeffrey J. White) to replace the original contractor who had negligently breached the construction contract. In addition, petitioner and respondents' attorney (Steven A. Ross, Esq.) began modifying its terms based upon their ongoing conversations, e-mails and conduct. Specifically, petitioner and Ross agreed that petitioner could pay respondents the $50,000 reinstatement fee in February of 2008 rather than incident to the Allonge's execution on August 1, 2007, with petitioner paying $583.33 in monthly interest until this sum was paid(App. 17).

Petitioner also agreed with Ross that she could "remain in the agreement until the house was sold" thus extending the dates contained in the Allonge indefinitely and that the house could be rented until it was sold, all at variance with the terms of the Allonge (*Id.*).

Petitioner and Ross further agreed that petitioner would pay respondents' deposition costs, their Massachusetts attorneys' fees and the attorney's fees of Ross' Maine counsel, none of which was required under the Allonge(App. 17-18). In addition, with Ross' approval, the deadline in the Allonge for the "substantial completion" of the home's construction was extended with a Certificate of Occupancy for the home being issued on June 25, 2008, and with respondents disbursing funds to petitioner's contractor for his work in accomplishing the home's completion (App. 18-19). All of these changes were at variance with the Allonge and modified its provisions (*Id.*).

In the summer of 2008, petitioner and Ross collaborated in preparing petitioner's home for sale or rent, none of which was required by the Allonge. Petitioner paid for the property's rental advertising as well as its furnishings (cable TV and other equipment) in order to put the property in a condition fit for rental or sale. Respondents' Ross communicated with various real estate brokers about the sale or rental of the property; and Ross agreed with petitioner that the rent would be split between respondents (90%) and petitioner(10% plus costs).

Despite these modifications of the Allonge by petitioner and respondents' Ross, changes which led

petitioner to believe that the project remained on track and that she would have a reasonable marketing opportunity to sell or rent her home once the Certificate of Occupancy was issued, respondents on July 3, 2008, just eight days after the Certificate of Occupancy issued, filed in the York County Superior Court an Affidavit in Support of Default of Allonge and Loan Restatement Agreement, seeking to foreclose on the property once more(App. 13-15).

In his affidavit, Pine Banks' attorney, Alan E. Shepard, averred the existence of the Allonge and that petitioner had defaulted thereunder in three respects: (1) she had failed to tender payment of the reinstatement fee of $50,000 upon execution of the Allonge on August 1, 2007 ; (2) she had failed to have the construction of the home "substantially completed" by February 1, 2008; and (3) as of June 20, 2008, the home's construction was not substantially complete (App. 14).

Petitioner responded with her own opposing affidavit with attached e-mails and other communications between her and Ross detailing all of the abovementioned modifications of the Allonge which she and Ross agreed to, every one of which undercut the purported defaults which respondents now relied upon in their affidavit in support of foreclosure(App.16-19). Petitioner further requested 'a hearing on this matter"(App. 19).She also adduced the opposing affidavit of her builder Jeffrey J. White who averred that construction of petitioner's home was "substantially complete" prior to the time the Certificate of Occupancy issued on June 25, 2008 (App. 20-21).

Respondents adduced two further affidavits, the first by Shepard contending that a hearing on this matter "is unnecessary, as there can be no dispute that [petitioner] has not tendered payment as required under the [Allonge]"(App. 22-23). The second affidavit authored by respondents' Ross *admitted that he and petitioner modified crucial parts of the Allonge in order to put the project back on track so that construction of petitioner's home could be accomplished* (App. 24-26).

Specifically, Ross averred when petitioner could not pay immediately the $50,000 reinstatement fee due under the Allonge at its execution on August 1, 2007,

> rather than seeking an immediate default, *I extended the timeframe for the payment of this amount*, provided that she pay interest on the $50,000, and reimburse my firm for costs in [sic] attorney's fees incurred for the taking of my deposition, that was overlooked in the original agreement as a reimbursable expense....

(App. 25)(emphasis supplied). Ross claimed that this was *the only modification* of the Allonge—a concession on his part that the Allonge had in fact been modified(*Id.*). He characterized their further modification allowing petitioner to stay in the home indefinitely without payment as "patently absurd"(*Id.*).

With the contentions of the parties in this posture, the matter came on for a hearing before Brennan, J., in the York County Superior Court on August 26, 2008. No evidence was taken and only arguments of counsel were heard. Petitioner's counsel requested an evidentiary hearing in order to determine

through testimonial and documentary evidence, subject to cross examination, the nature of the parties' modifications of the Allonge as well as the amounts due respondents under the notes. Although the Superior Court Judge adverted to the due process concerns about enforcing the Allonge on this record, he denied petitioner's request for an evidentiary hearing on the contested issues of modification and the amount of debt due respondents.

On September 12, 2008, and September 18, 2008, judgments of foreclosure entered in favor of respondents, respectively, in the Superior Court (App. 4-6;27). Petitioner appealed these judgments to the Supreme Judicial Court of Maine. She argued that the lower court's failure to provide her with an opportunity to contest and rebut respondents' affidavits describing her defaults under the Allonge as well as the money due under each of these notes was a denial of due process.

On May 12, 2009, the Maine Supreme Judicial Court affirmed the judgments of foreclosure entered against petitioner in the York County Superior Court(App. 1-3). Relying upon *Verizon New England, Inc. v. Pub. Utils. Comm'n*, 866 A.2d 844, 849(Me. 2005), the court ruled that petitioner could waive her constitutional rights, including her rights to a hearing, and that she did so here when she executed the Allonge, an enforceable settlement agreement (App. 2).

On June 12, 2009, the Supreme Judicial Court of Maine denied petitioner's Motion for Reconsideration (App. 7).

REASONS FOR GRANTING THE PETITION

The Proceedings Below Denied Petitioner Due Process Of Law Because She Was Given No Opportunity To Prove At An Evidentiary Hearing That The Allonge And Loan Reinstatement Agreement Was Modified By The Parties So That Foreclosure On Her Property Was Not Justified.

Respondents' foreclosure of petitioner's property was founded on her alleged failure under the Allonge to tender the $50,000 reinstatement fee timely and her alleged failure to have the construction of her home substantially completed either by February 1, 2008, or later by June 20, 2008(App. 14). Yet each of these conditions in the Allonge was no longer available to respondents to justify foreclosure because each of these conditions had been modified by petitioner and respondents after the Allonge was executed on August 1, 2007.

As even Ross *admitted* in his affidavit, he agreed to extending the timeframe for petitioner's payment of the Allonge's reinstatement fee of $50,000, provided that she pay interest on the $50,000, and reimburse his firm for costs and attorney's fees incurred for the taking of his deposition, monies that were overlooked in the original agreement as a reimbursable expense(App. 25). Petitioner kept her part of this new agreement and Ross' affidavit does not argue otherwise.

Moreover, as petitioner's opposing affidavits and materials make clear, Ross and petitioner agreed that the deadline in the Allonge for the "substantial completion" of the home's construction was extended

from February 1, 2008, so that a Certificate of Occupancy for the home could be issued on June 25, 2008, with respondents disbursing funds to petitioner's contractor for his work in accomplishing this event (App. 17-19;21). Ross also agreed with petitioner that she could "remain in the agreement until the house was sold" thus extending the dates contained in the Allonge so that the house could be rented or sold in a reasonably commercial time (App.17).

In furtherance of these modifications of the Allonge, petitioner and Ross collaborated in the summer of 2008 in preparing petitioner's home for sale or rent with Ross himself communicating with various real estate brokers about this event; and Ross agreed with petitioner that any rent would be split between respondents (90%) and petitioner(10% plus costs)(App. 17-19).

All of this activity between petitioner and respondent in the wake of the Allonge, shown by e-mails, telephone conversations and their conduct, was persuasive evidence that the parties had modified their obligations under the Allonge so that petitioner would have a reasonable marketing opportunity to sell or rent her home and, at the same time, fulfill her financial obligations in order to avoid foreclosure. Yet once the Certificate of Occupancy was issued for petitioner's home, respondents opportunistically withdrew their participation in this modified Allonge and immediately sought to foreclose on petitioner's property.

Petitioner deserved as a matter of right a full evidentiary hearing in the York County Superior Court in order to determine through testimonial and

documentary evidence, subject to cross examination, the nature of the parties' modifications of the Allonge as well as the amounts due respondents under the two notes. The non-evidentiary hearing provided the parties in the Superior Court where no evidence was taken and only arguments of counsel were heard is no substitute for the process which should have preceded the judgments of foreclosure. The lower courts' denial of this evidentiary hearing is a denial of due process.

Petitioner submits that the proceedings in York County Superior Court by which final judgments of foreclosure were rendered against her deprived her of the process she was due under the fourteenth amendment to the federal constitution in the following ways: she was denied adequate notice of the truncated proceedings; she was denied the opportunity to adduce testimony or documentation in support of her objections to foreclosure; she was denied the right to take testimony from or confront respondents' attorneys in rebuttal to their motion to foreclose; and she was denied the right to argue on the evidence which rebutted respondents' claim that foreclosure was justified in the circumstances.

Petitioner's Property Interest

The starting point in defining petitioner's rights is identifying petitioner's property or liberty interest at risk in these proceedings. Under the due process clause of the fourteenth amendment, petitioner would be entitled to procedural due process if the property/liberty interest at stake is deemed to be of such magnitude or importance that its loss can fairly be characterized as important: and it depends upon the

extent to which the individual will be "condemned to suffer grievous loss." *Morrissey v. Brewer*, 408 U.S. 471, 481(1972) quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). *Goldberg v. Kelly*, 397 U.S. 254, 262-263(1970).

The loss of petitioner's home constitutes a final, lasting deprivation of property entitling her to the protection of the due process clause. *Los Angeles v. David*, 538 U.S. 715, 717(2003) (deprivation of even money is the deprivation of property for purpose of evaluating due process protection). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538; 541 (1985)("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and *property*—cannot be deprived except pursuant to constitutionally adequate procedures") (emphasis supplied). The Due Process Clause mandates that a sanction such losing one's home "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-767(1980).

What Process Was Due Petitioner?

Once it is determined that the Due Process Clause applies to the proceedings below, "the question remains what process is due." *Loudermill*, 470 U.S. at 541 quoting *Morrissey v. Brewer*, 408 U.S. at 481. This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335(1976) dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including

the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The *Mathews* calculus contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529(2004).

Employing the *Mathews* calculus in order to balance petitioner's legitimate private interest not to be sanctioned with the loss of her home unfairly against the judicial system's need for efficient administration, petitioner submits that the process due her below consists of the following elements:

A. Adequate Notice. Petitioner was entitled to notice of the hearing on foreclosure in Superior Court which was reasonably calculated, under all the circumstances, to apprise her of the precise nature of this proceeding. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950). The notice was required to be of a kind which would reasonably and fairly convey to her the required information so that she could appear and respond effectively with her objections and proof in whatever form was allowed. *Id. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14 (1978).

B. A Full Evidentiary Hearing On Contested Fact Issues. The procedures to be employed should be "tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. at 268-269. There were fundamental fact questions

to be determined by the Superior Court Judge before he could impose the sanction of foreclosure consonant with respondents' motion for such relief, e.g., was the Allonge a currently enforceable agreement?; had the parties through their conduct, e-mails and other communications modified or changed their respective obligations thereunder so that the Allonge was no longer an enforceable document entitling respondents to foreclosure?; and if petitioner was in default of the Allonge, what was the amount of the debt due each respondent?

Moreover, considering the level of financial deprivation which would flow from the Superior Court's decision on such a dramatic sanction as foreclosure and the low tolerance for the risk of a mistaken decision, see *Morrissey v. Brewer*, 408 U.S. at 485-489, these fact questions could not be resolved by just oral argument by counsel or by requiring that the parties submit their respective positions only "on the papers." Instead, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. at 269-270 citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 93-94 (1913) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104 (1963).

The right to cross-examine and confront adverse witnesses and their evidence implies the right to marshal and adduce one's own evidence in support of a position on a contested fact issue such as (1) whether the Allonge had been modified by the parties' conduct and communications so that foreclosure was not justified and (2) the precise amount of the debt due

respondents under each of the notes, if petitioner's liability was established.

Especially where the contested facts were subject to different interpretations by the parties and where the resulting decision would result in dramatic financial deprivation, petitioner was entitled to a full evidentiary hearing so that the Superior Court Judge would have a fair and complete record upon which to make its findings on each crucial fact issue while at the same time giving an appellate court a sufficient record upon which to review the hearing judge's factfinding. See *Goldberg v. Kelly*, *supra*. Any doubt by the hearing judge on this score should be resolved in favor of taking evidence. See *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 894 (1st Cir. 1988). In this process, the parties' respective burdens of proof would be a preponderance of the evidence. *Addington v. Texas*, 441 U.S. 418, 423 (1979). See *Hamdi v. Rumsfeld*, 542 U.S. at 534.

Petitioner was denied this full evidentiary hearing on the crucial fact issues which respondents relied upon in seeking to foreclose on her property. The refusal by the York County Superior Court to allow petitioner to adduce testimonial and documentary proof in support of her objections violated petitioner's due process right to a full and fair evidentiary hearing on her objections, as guaranteed her by the constitution and the decisions of this Court. See *Goldberg v. Kelly*, 397 U.S. at 269-270 citing *ICC v. Louisville & N. R. Co.*, 227 U.S. at 93-94 and *Willner v. Committee on Character and Fitness*, 373 U.S. at 103-104.

Nor do the reasons identified by the Maine Supreme Judicial Court for affirming the foreclosure

judgments pass constitutional muster on this record. It reasoned that the Allonge is a binding contract in settlement of petitioner's default under the original financing documents and that by entering into the Allonge, petitioner "waived any due process argument on this issue, as to either the defaults or the amounts owed"(App. 2). This reasoning is wrong in two respects.

First, settlement agreements such as the Allonge are analyzed like any other contracts and, like any other contract, the Allonge could be modified by the parties unless prohibited by its own terms. *Muther v. Broad Cove Shore Association*, 968 A.2d 539, 541(Me. 2009). *White v. Fleet Bank of Maine*, 875 A.2d 680, 683(Me.2005). *Machias Sav. Bank v. Ramsdell*, 689 A.2d 595, 599 (Me. 1997)(modification of a settlement agreement is an issue of fact precluding summary judgment). *There is no provision anywhere in the Allonge----drafted by respondents' attorney---prohibiting the parties from modifying its terms either orally or in writing.*

Whether the Allonge was modified, changing the obligations of the parties and thereby changing the propriety of foreclosure here, depends on the intent of the parties as manifested by their conduct, communications, etc. See, e.g., *Forrest Assoc. Passamaquoddy Tribe*, 760 A.2d 1041, 1043(Me. 2000); *McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 51-52(Me. 1996). Petitioner should have been afforded the right to a full evidentiary hearing in Superior Court in order to show by her proof that she and respondents had modified the Allonge so that she was no longer obligated to tender the $50,000 reinstatement fee by August 1, 2007, and that she no longer had to have the construction of her

home substantially completed by February 1, 2008, or even by June 20, 2008. These were genuine issues of material fact which deserved to be tried to the Superior Court only after a full evidentiary hearing.

Second, and more important, while a party to an agreement may waive her constitutional rights, see, e.g., *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 185(1972), the waiver of her due process rights to notice and the opportunity to be heard must be clear and unequivocal. *Fuentes v. Shevin*, 407 U.S. 67, 95(1972). Nowhere in the Allonge did petitioner clearly and unequivocally waive any of her constitutional rights, especially her right to contest in a full evidentiary hearing respondents' foreclosure of her home based upon an obsolete financing document which had been modified by the parties since its execution.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the judgments of the Maine Supreme Judicial Court and, ultimately, to vacate those judgments and remand the matter to the York County Superior Court for an evidentiary hearing consistent with due process on the legal propriety of respondents' right to foreclose on petitioner's property under the Allonge and Loan Reinstatement Agreement; or provide petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Roberta A. Golden, *Pro Se*
41 Pleasant Street
Framingham, MA 01701
(508)370-9881

(any footnotes trail end of each document)

Docket No. Yor-08-559
SUPREME JUDICIAL COURT OF MAINE

CHARLES H. HOUSMAN, TRUSTEE et al.

v.

ROBERTA A. GOLDEN

April 30, 2009, Submitted on Briefs
May 12, 2009, Decided

NOTICE: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE MAINE RULES OF APPELLATE PROCEDURE FOR CITATION OF MEMORANDA OF DECISION.

Panel: SAUFLEY, C.J., and CLIFFORD, ALEXANDER, LEVY, SILVER, and MEAD, JJ.

MEMORANDUM OF DECISION

Roberta Golden appeals from two judgments entered in the Superior Court (York County, *Brennan, J.*) in favor of plaintiff lenders Charles J. Housman, as Trustee of the Pine Banks Nominee Trust, and Wallace Capital, LLC, on their complaint, brought pursuant to 14 M.R.S.A. §§ 6321-25 (2003), [1] for a foreclosure judgment and sale. Contrary to Golden's contentions, the court did not violate her right of due process when it entered the judgments of foreclosure without first conducting

an evidentiary hearing on her allegation that an allonge agreement, entered into in settlement of the claims, had been modified. Golden acknowledged in the allonge agreement that she had defaulted on the promissory notes. She also agreed that a judgment of foreclosure could be entered upon any further defaults. Golden defaulted by failing to pay the underlying obligations by the date set forth in the allonge agreement. The agreement further provided that the court could accept an affidavit as evidence of any default and would have the discretion either to enter a judgment of foreclosure or to conduct a hearing. The allonge agreement is a binding contract in settlement of the defaults. *See Muther v. Broad Cove Shore Ass'n*, 2009 ME 37, P6, 968 A.2d 539, 541-42 (settlement agreements are analyzed as contracts). By entering into the allonge agreement, Golden waived any due process argument on this issue, as to either the defaults or the amounts owed. *See Verizon New England, Inc. v. Pub. Utils. Comm'n*, 2005 ME 16, P14, 866 A.2d 844, 849 (it is well settled that a party may waive a constitutional right).

The entry is:

Judgments affirmed.

Footnote

1 Because the foreclosure action was commenced in 2006, we cite to the statutory scheme as it was written at that time. 14 M.R.S.A. § 6321-25 (2003). Since 2006, sections 6321 and 6323 have been amended. P.L. 2007, ch. 391, § 9 (effective Sept. 20, 2007) (codified at 14 M.R.S. § 6321 (2008)); P.L. 2007, ch. 103, § 1 (effective

Sept. 20, 2007) (codified at 14 M.R.S. § 6323 (2008)). These amendments have no bearing on this case.

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
Civil Action
Docket No. RE-2006-00044

CHARLES J. HOUSMAN, as Trustee of the Pine Banks Nominee Trust, and
WALLACE CAPITAL, LLC, Plaintiffs
v.
ROBERTA A. GOLDEN Defendants

JUDGMENT (Wallace Capital, LLC)

This matter came, before the Court on Plaintiff, Wallace Capital, LLC's request for Judgment, pursuant to the terms of the Allonge and Loan Reinstatement Agreement dated July 31, 2007, entered between the parties in this matter. The Court finds that there has not been a tender of payment due and owing on August 1, 2008, and therefore- in accordance with the terms of the Allonge and Loan Reinstatement Agreement, Judgment is entered for the Plaintiff Wallace Capital, LLC as follows:

1. The Defendant has failed to pay the Promissory Note and Mortgage.

2. The Plaintiff, Wallace Capital, LLC, is owed as of July 31, 2008. the following:

Principal: $649,633.36
Accrued Interest: $85,177.49
Per Diem: $213.57

Filing Fees and Costs: $195

Plaintiff is entitled to additional attorney's fees incurred as a result of the breach of the aforementioned Agreement.

3. The order of priority of the claims of the parties in this action is as follows:

FIRST: The holder of any first mortgages on the respective property owned by the defendant;

SECOND: The Plaintiff by virtue of its lien.

WHEREFORE, it is hereby ORDERED and DECREED that if Defendant does not pay the Plaintiff the amount due, together with accrued interest and late charges, as set forth above within 90 days of the date hereof, Plaintiff shall sell the mortgaged real estate pursuant to 14 M.R.S.A. § 6321 seq. and disburse the proceeds of said sale after deducting the expenses thereof in the amounts and priorities, as determined above. Plaintiff is granted exclusive possession of the real estate mortgaged to them upon expiration of the Statutory ninety (90) day redemption period and Defendant is Ordered to vacate the real estate at that time if Defendant has not by that date redeemed the real estate in accordance with Statutory procedure. A Writ of Possession shall be issued to the Plaintiff for possession of said real estate if it is not redeemed, as aforesaid.

The following provisions are set forth pursuant to 14 M..R.S.A. §2401:

1. The names and addresses, if known, of all parties to the action, including the Counsel of Record are set forth in Schedule A attached hereto.

2. The Docket Number is: RE-2006-00044.

3. The Court finds that all parties have received notice of the proceedings in accordance with the applicable provisions of the Maine Rules of Civil Procedure.

4. A description of the real estate involved is set forth in Schedule B attached
hereto.

5. The Plaintiff is responsible for recording an attested copy of the Judgment and for paying the appropriate recording fees.

The Clerk is hereby directed to enter this Judgment as a final Judgment pursuant to Rule 54(6)(1). The Clerk is specifically directed pursuant to M.R.Civ.P. Rule 79(a) to enter this Judgment on the civil docket by notation, incorporating it by reference.

Unless otherwise specified, all other pending motions or requests for relief are denied.

9/15/08

Docket No. Yor-08-559 Decision No. Mem 09-84

MAINE SUPREME YUDICTAL COURT sitting as the Law Court

CHARLES H. HOUSMAN, TRUSTEE

v.

ROBERTA A. GOLDEN

ORDER DENYING MOTION TO RECONSIDER

Roberta Golden moved for reconsideration of the Court's decision dated 14 say 12, 2009. The motion has been reviewed and considered by, the panel that decided the original appeal.

The motion is DENIED.

Dated: .June .12, 2009

ALLONGE AND LOAN REINSTATEMENT AGREEMENT

This Allonge Agreement is entered this 31st day of July, 2007 by and between Roberta Golden of Framingham, Massachusetts (hereinafter "Golden") and the Pine Banks Nominee Trust (hereinafter "Pine Banks") and Wallace Capital LLC (hereinafter "Wallace").

WHEREAS, there is a Complaint for Foreclosure against Golden by Pine Banks and Wallace, and a Counterclaim asserted by- Golden against Pine Banks and Wallace, all of which are pending in the York County Superior Court in Alfred, Maine, Docket # RE-2006-00044;

WHEREAS, it has been alleged in this Complaint, that there has been a default in the underlying obligations between Pine Banks, Wallace Capital and Golden;

WHEREAS, Golden, Pine Banks and Wallace are all desirous of reinstating the loans with each party and to allonge the note terms in accordance with their agreements embodied herein;

NOW THEREFORE in exchange of the mutual covenants, promises and agreements and for adequate consideration, the parties agree as follows:

1. Upon the execution of this agreement, Golden shall pay the sum of FIFTY THOUSAND ($50,000) DOLLARS in association with the reinstatement of the loans with both Pine Banks and Wallace Capital, with

the funds being applied to the accrued interest on the Pine Banks Note.

2. It is acknowledged and agreed that the obligations with Pine Banks and Wallace Capital as described in the pending lawsuit shall be modified as follows:

a. The maturity date for both of the underlying obligation will be extended to August 1, 2008, and there shall be no required monthly payments on either loan or obligation.

b. The interest rate for the Wallace Capital obligation shall be reduced to twelve percent (12%), retroactive to the. closing date of January 17, 2006,

c. Wallace Capital shall disburse the remaining balance of the construction loan in the amount of $405,152.30, in accordance with the disbursement schedule attached hereto as Exhibit A, and shall also advance funds for the payment of all delinquent real estate taxes.

d. Golden shall pay the difference for any increased costs beyond the disbursement schedule out of her own funds within a period of 30 days after any of the individual disbursements.

e. Pine Banks and Wallace Capital waive any default interest and late fees accrued to date on the obligations,

f. All construction shall be substantially complete on or before February 1, 2008.

g. Golden shall be responsible for attorneys fees and costs . incurred by both Pine Banks and Wallace in the

aggregate amount of $18,000 which costs shall be collected upon the maturity of the obligations, and shall accrue no interest. Nothing in this paragraph shall prevent the collection of additional fees for any future default or failure to abide by the terms of this agreement.

3. It is acknowledged and agreed by Golden that the underlying obligation to Pine Banks as of July 30, 2007, had a principal amount due of $816,227,00, and accrued interest of $171,407.66 for a total balance (before application of $50,000 payment described above) of $987,634.66, with the interest calculated on the principal only.

4. It is acknowledged and agreed by Golden that the underlying obligation to Wallace as of July 30, 2007, had a principal amount of $232,255,06, and accrued interest of $39,507.63, for a total balance of $271,762.69.

5. Golden shall agree to a stipulation of Judgment and dismissal of he counterclaims in Superior Court, which shall be held in escrow, and not be filed until August 1, 2008, or sooner if the loan is paid in full, which-judgment shall acknowledge that Golden had defaulted on the obligations, but there shall be no judgment of Foreclosure entered. The Judgment shall also provide that a Judgment for Foreclosure shall be entered by the Court in the future, if there are any further defaults by Golden in the loan obligations, and in the performance of this Agreement. The Court would accept an affidavit as evidence of any default, and the Plaintiff would provide- a copy to Golden's attorney upon filing. Golden would have 14 days from the date of the filing of the affidavit to object. After the filing of an

objection by Golden, or upon the failure to file an objection, the Court would have the discretion to either enter the Judgment of Foreclosure, or conduct a hearing on the alleged default on the next available trial date. A default as defined herein shall be the failure of Golden to perform any of the following terms;

a. Have the construction substantially completed on or before February 1, 2008.

b. Pay off the underlying obligation on or before August 1, 2008.

c. Pay the difference for any increased costs beyond the disbursement schedule out of her own funds within a period of 30 days after any of the individual disbursements.

d. Maintain adequate homeowners insurance on the property.

6. Golden acknowledges and confirms the validity of enforcement of the underlying Notes and Mortgages with Pine Banks and Wallace.

7. In all other respects, and except to the extent modified hereunder, the underlying notes and mortgage of Pine Banks and Wallace remain in full force and effect.

8. The signatories hereto are duly authorized to act and sign on behalf of their respective principals, and the parties hereto rely upon such authorizations.

IN WITNESS WHEREOF the parties have hereto set their signatures below:

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
Civil Action
Docket No. RE-2006-00044

CHARLES J. HOUSMAN, as Trustee of the Pine Banks Nominee Trust, and
WALLACE CAPITAL, LLC, Plaintiffs

v.

ROBERTA A. GOLDEN,
Third Party Plaintiff/Defendant v.

ROCKMERE LODGE, ANDREW F. ANTONIUK, ROBERT BROWN and DOUGLAS FLINT,
Third Party Defendant

AFFIDAVIT IN SUPPORT OF DEFAULT OF ALLONGE AND LOAN RESTATEMENT AGREEMENT

I, ALAN E. SHEPARD, after being duly sworn, depose and say:

1. My name is Alan E. Shepard, and I am an attorney licensed to practice law in the State of Maine, and am a partner in the law firm of Shepard & Read, which has an office in Kennebunk, Maine.

2. Our firm represents the Plaintiffs Pine Bank Nominee Trust and Wallace Capital LLC in this matter.

3. By an Allonge and Loan Reinstatement Agreement dated July 31, 2008, the parties in this matter entered into an agreement that allowed for the reinstatement of certain loan obligation of the Defendant. Roberta Golden, that the Plaintiffs had alleged were in default and subject to foreclosure.

4. The Defendant, Roberta Golden, has failed to perform in accordance to this Agreement and is therefore in default of the same as follows:

a. The Defendant failed to tender payment in the amount of $50,000 upon the execution of the Agreement.

b. The Defendant failed to have the construction substantially complete by February 1, 2008, and as of this date the following items were not completed:

drywall
interior and exterior painting
hardwood and tile installation
interior doors and trim
kitchen cabinets and vanities
countertops
appliances
finish electric
finish plumbing
finish HVAC
front porch and deck rails
landscaping and retaining walls

c. As of June 20, 2008, the last day the inspector was on the property, the house was not substantially complete.

5. A copy of this Affidavit is on this day being sent to the Defendant's attorney Jens-Peter Bergen.

6. In accordance to the terms of the Allonge and Loan Reinstatement Agreement, the Plaintiffs would be entitled to Judgment if there is no objections filed by the Defendant in 14 days, or if there is an objection, by the Court's discretion unless the Court determines that a hearing is necessary.

7. Further your deponent sayeth naught.

DATED: June 30, 2008

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
Civil Action
Docket No. RE-2006-00044

CHARLES J. HOUSMAN, as Trustee of the Pine Banks Nominee Trust, and
WALLACE CAPITAL, LLC, Plaintiffs

v.

ROBERTA A. GOLDEN,
Third Party Plaintiff/Defendant v.

ROCKMERE LODGE, ANDREW F. ANTONIUK, ROBERT BROWN and DOUGLAS FLINT,
Third Party Defendant

AFFIDAVIT IN OPPOSITION TO THE AFFIDAVIT OF ALAN E. SHEPARD IN SUPPORT OF DEFAULT OF ALLONGE AND LOAN REINSTATEMENT AGREEMENT

I, ROBERTA A. GOLDEN, after being duly sworn, depose and say:

1. My name is Roberta A. Golden, and I am the Defendant in the above - captioned action. and I am the owner of the property that is the subject matter of the Agreement discussed herein.

2. This Affidavit is being filed in opposition to the Affidavit of Alan E. She and Esq., who represents the

Plaintiffs, Charles J. Housman , as Trustee of the Pine Banks Nominee Trust and Wallace Capital, LLC.

3. It is true that there was an Allonge and Loan Reinstatement that was put into effect on or about August 1, 2007 between the Plaintiffs and the Defendant.

4. The Defendant, Roberta Golden, states that, after the signing of the Agreement, there was a modification to the Allonge and Reinstatement Agreement, and that Roberta Golden is not in default of the Allonge Agreement or of its modification, The $50,000.00 payment was made and the "substantial completion" was accomplished and the certificate of occupancy has been issued. The facts are as follows:

5. With the approval of the agent of the Plaintiffs, Attorney Steven Ross, the payment of the $50,000.00 was made after the execution, with the understanding that the Defendant, Roberta Golden, would be able to remain in the agreement until the house was sold, thus extending the dates indefinitely. (See Exhibit A - series of emails and other correspondence between Roberta Golden and Steven Ross).

6. The Defendant, Roberta Golden, paid substantial amounts in consideration of the modification of the agreement, including monthly payments in the amount of $583.33. representing the interest on the $50,000.00, totaling approximately $3,489.98; the payment of deposition costs for the Plaintiffs' agent, Steven Ross's deposition in the amount of $422.24 and the payment of the Plaintiffs Massachusetts attorneys' fees, all of which were not required under the original Allonge, and his

Maine attorney, in the amount of more than $5,012.44..(See Exhibit B).

7. With the approval of the agent of the Plaintiffs, Attorney Steven Ross, the timetable for the construction of the house was extended and the house does have an occupancy permit as of June 25, 2008. (See Exhibit C) Furthermore, the Allonge agreement calls for substantial completion, not an occupancy permit, and substantial completion was accomplished long before the occupancy permit was issued and requires the testimony of the present builder, Jeff White, to establish the date of the actual "substantial completion"..

8. The causes of the delay in construction were due to the negligent and poor workmanship of the previous builder, Blair Hodge, who had been dealing directly and `behind the back' of the Defendant, with the Plaintiffs' agent, Steven Ross, and without the knowledge of the Defendant, being paid by the Plaintiffs out of the Defendants' construction funds and without her knowledge or notification. (See Exhibit D - Letter to Steven Ross from Jeff White, present builder)

9. The Defendant had promptly made arrangements with the new builder, Jeff white, immediately after the August 2007 Allonge agreement was signed and actually signed a contract with the new builder on October 4, 2007 with a completion date of February 1, 2008, all in compliance with the Allonge Agreement. (See Exhibit E).

10. The Plaintiffs' agent, Steven Ross, kept accepting payments from the Defendant in the form of

the $50,000.00, the interest on the $50,000.00 in the amount of approximately $3,489.98, the attorneys fees, and the payment of the deposition costs, all of which were in accordance with the original Allonge Agreement and the modification to the Allonge agreement, which was agreed to by both parties.

11. A copy of this Affidavit is on this day being sent to the Plaintiffs attorney, Alan Shepard and Defendant's attorney, Jens Bergen.

12. The Defendant requests a hearing on this matter, which is allowed pursuant to the Allonge and Restatement Agreement, in the Court's discretion.

13. Further your deponent sayeth naught.

DATED: July 10, 2008

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
Civil Action
Docket No. RE-2006-00044

CHARLES J. HOUSMAN, as Trustee of the Pine Banks Nominee Trust, and
WALLACE CAPITAL, LLC, Plaintiffs

v.

ROBERTA A. GOLDEN,
Third Party Plaintiff/Defendant v.

ROCKMERE LODGE, ANDREW F. ANTONIUK, ROBERT BROWN and DOUGLAS FLINT,
Third Party Defendant

AFFIDAVIT SUBMITTED ON BEHALF OF DEFENDANT IN OPPOSITION TO PLAINTIFFS' REQUEST FOR DEFAULT OF ALLONGE AND LOAN REINSTATEMENT AGREEMENT

I, Jeffrey J. White, being duly sworn, depose and say:

1. My name is Jeffrey J. White, and I am resident of Biddeford, Maine.

2. I understand, believe in and abide by the obligations of an oath. I submit this Affidavit at the behest of Roberta A. Golden, and her counsel of record, Jens-Peter W. Bergen, Esq.

3. I own and operate J. White Associates, a general contracting firm engaged by Roberta A. Golden., with the assent of the Plaintiffs or their agents, to complete the construction of Ms. Golden's home situated at 140 Steams Road, Ogunquit, Maine. I did so pursuant to the contract attached as Exhibit A. My firm fully performed under that contract, which performance I was personally involved with daily.

4. Mrs. Golden timely sought a building permit from the Town of Ogunquit, the same issuing on September 14, 2007, a true copy of which is attached as Exhibit B.

5. I have been aware that an Affidavit has recently been submitted to the York County Superior Court in the above captioned action which alleges, in relevant part, that the home owned by Roberta A. Golden situated at 140 Steams Road, Ogunquit, was not substantially complete as of June 20, 2008. That averment is incorrect.

6. In fact, a Certificate of Occupancy for this property issued on June 25, 2008. Prior to that date, the property was substantially complete, and in all respects, compliant with the building code applicable to the Town of Ogunquit. I attach a copy of that Certificate of Occupancy as Exhibit C.

Dated at Kennebunk, Maine this 14 day of July, 2008.

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
Civil Action
Docket No. RE-2006-00044

CHARLES J. HOUSMAN, as Trustee of the Pine Banks Nominee Trust, and
WALLACE CAPITAL, LLC, Plaintiffs

v.

ROBERTA A. GOLDEN,
Third Party Plaintiff/Defendant v.

ROCKMERE LODGE, ANDREW F. ANTONIUK, ROBERT BROWN and DOUGLAS FLINT,
Third Party Defendant

AFFIDAVIT IN SUPPORT OF DEFAULT OF ALLONGE AND LOAN RESTATEMENT AGREEMENT

I, ALAN E.. SHEPARD, after being duly sworn, depose and say:

1. My name is Alan E. Shepard, and I am an attorney licensed to practice law in the State of Maine, and am a partner in the law firm of Shepard & Read, which has an office in Kennebunk, Maine.

2. Our firm represents the Plaintiffs Pine Bank Nominee Trust and Wallace Capital LLC in this matter.

3. By an Allonge and Loan Reinstatement Agreement dated July 31, 2008, the parties in this matter entered into an agreement that allowed for the reinstatement of
certain loan obligation of the Defendant, Roberta Golden, that the Plaintiffs had alleged were in default and subject to foreclosure.

4. The Defendant, Roberta Golden, has failed to perform in accordance with this Agreement and is therefore in default of the same by her failure to tender payment on the amounts owed on or before August 1, 2008.

5. A copy of this Affidavit is on this day being sent to the Defendant's attorney Jens-Peter Bergen.

6. In accordance to the terms of the Allonge and Loan Reinstatement Agreement, the Plaintiffs would be entitled to Judgment if there is no objections filed by the Defendant in 14 days, or if there is an objection, by the Court's discretion unless the Court determines that a hearing is necessary.

7. In this case a hearing is unnecessary, as there can be no dispute that the Defendant has not tendered payment as required under the Agreement.

8. Further your deponent sayeth naught.

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
Civil Action
Docket No. RE-2006-00044

CHARLES J. HOUSMAN, as Trustee of the Pine Banks Nominee Trust, and
WALLACE CAPITAL, LLC, Plaintiffs

v.

ROBERTA A. GOLDEN,
Third Party Plaintiff/Defendant v.

ROCKMERE LODGE, ANDREW F. ANTONIUK, ROBERT BROWN and DOUGLAS FLINT,
Third Party Defendant

AFFIDAVIT OF STEVEN A. ROSS

I, STEVEN A. ROSS, after being duly sworn, depose and say

1. My name is Steven A. Ross, and I am an attorney licensed to. practice law in the Commonwealth of Massachusetts, and am a partner in the law firm of Gilmartin, Magence & Ross, which has an office in Boston Massachusetts.

2. Our firm represents the Pine Bank Nominee Trust (hereinafter "Pine Banks), and Wallace Capital LLC (hereinafter "Wallace Capital"), and I was lender's

counsel for the loans that are the subject matter of this lawsuit.

3. I was party to the Allonge and Reinstatement Agreement dated July 31, 2007, which required the Defendant to pay $50,000 up front, in exchange for the agreement that the construction loan would be reinstated and advanced to allow for the completion of the house.

4. After the Agreement was executed, the Defendant immediately informed me that she did not have the $50,000, and rather than seeking an immediate default, I extended the timeframe for the payment of this amount, provided that she pay interest on the $50,000, and reimburse my firm for costs in attorneys fees incurred for the taking of my deposition, that was overlooked in the original agreement as a reimbursable expense, all as outlined in my e-mail of November 29, 2007, attached hereto.

5. There were no other extensions or modification to the Allonge and Reinstatement Agreement, or the underlying loan obligations.

6. The suggestion by the Defendant in her affidavit that the terms of the loan were modified to allow her to stay in the home indefinitely without payment is patently absurd.

7. The Lenders have over $1.8 million in indebtedness on this property that has been listed for sale by the Defendant for an asking price of $2,200,000.00 without success, and the continued accrual of interest is making it increasingly less likely

that the sale of the property will pay off the indebtedness.

8. Upon information and belief, the Defendant is currently renting the property and pocketing the proceeds, while making no payments on these outstanding loans.

9. This case has been pending for over two years, and immediate action needs to be taken to allow the foreclosure of the property.

DATED: August 12, 2008

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
Civil Action
Docket No. RE-2006-00044

CHARLES J. HOUSMAN, as Trustee of the Pine Banks Nominee Trust, and
WALLACE CAPITAL, LLC, Plaintiffs
v.
ROBERTA A. GOLDEN Defendants

JUDGMENT (Pine Banks Nominee Trust)

This matter came, before the Court on Plaintiff, Pine Banks' request for Judgment, pursuant to the terms of the Allonge and Loan Reinstatement Agreement dated July 31, 2007, entered between the parties in this matter. The Court finds that there has not been a tender of payment due and owing on August 1, 2008, and therefore in accordance with the terms of the Allonge and Loan Reinstatement Agreement, Judgment is entered for the Plaintiff Pine Banks Nominee Trust as follows:

1. The Defendant has failed to pay the Promissory Note and Mortgage.

2. The Plaintiff, Pine Banks, is owed as of July 31, 2008. the following:

Principal: $816,227.00
Accrued Interest: $235,679.44
[INCOMPLETE]